United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7313

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

B P/S

PRESCOTT H. RATHBORNE,

Plaintiff-Appellant,

—against—

S. GARFINKEL and 873 THIRD AVENUE CORP.,

Defendants-Appellees,

—and—

CITADEL MANAGEMENT CO., INC., URBAN RELOCATION CO., INC., EDWIN J. GLICKMAN, ODYSSEY HOUSE, INC. and SALBIAN REALTY CO., INC.,

Defendants.

BRIEF FOR DEFENDANTS-APPELLEES, S. GARFINKEL AND 873 THIRD AVENUE CORP.

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BRIEF FOR DEFENDANTS-APPELLEES, S. GARFINKEL AND 873 THIRD AVENUE CORP.

Statement

Plaintiff Prescott H. Rathborne (hereinafter referred to as "Rathborne") appeals from a final judgment of the United States District Court for the Southern District of New York (Solomon, J.) dated April 24, 1975, dismissing the complaint and the counterclaim of 873 Third Avenue Corp. (hereinafter referred to as "873") after trial (iiiA).*

Rathborne was the tenant of Apts. No. 4 and No. 5 at 873-875 Third Avenue and 200 East 53rd Street (hereinafter referred to as the "Leased Premises") pursuant to written leases (5A-6A). In November, 1972, Rathborne abandoned the Leased Premises (5A-6A, 14A). Thereafter, and in or about February, 1973, he commenced the instant action against his landlord 873, the lessee of the Leased Premises pursuant to a master lease with Salbian; S. Garfinkel, the president of 873; Salbian Realty Co., Inc., the fee owner of 873-875 Third Avenue; Edwin J. Glickman, the principal of Salbian; Citadel Management Co., Inc. and Urban Relocation Co., Inc., the companies engaged by Salbian to relocate tenants; and Odyssey House, Inc., a drug rehabilitation center, seeking $1,000,000 in damages based upon allegations of wrongful eviction (iiiiA-viiiA). 873 counterclaimed for the sum of $8,750 representing the cost of restoring the apartments to a habitable condition, the unpaid November, 1972 rent, and the legal fees incurred in con-

* Numbers in parenthesis refer to pages in joint appendix.

nection with the collection of the November 1972 rent (viiiiA-xivA).

Prior to trial, Rathborne discontinued the action as against all defendants except 873 and Garfinkel (iiiA). Subsequently, Rathborne reinstated the action (75 Civ. 2392) against Citadel Management Co., Inc., Urban Relocation Co., Inc., Edwin J. Glickman, Salbian Realty Co., Inc., Siltan Development Corp., WOAS Properties Corp. and Madison Associates, seeking in excess of $5,000,000 alleging that they, *not Appellees,* "conspired among themselves and with others unknown to plaintiff . . . to cause tenants on the block, including plaintiff, to vacate their premises by improper and illegal means . . ." and as a result thereof "the block became so derelict that it was uninhabitable, and plaintiff was forced to vacate his apartment in November of 1972." That suit recently instituted is still pending. Trial in this suit was held before Hon. Gus J. Solomon, Senior Judge on October 21 and 22, 1974 (iiiA). Judge Solomon held "To prove constructive eviction, Rathborne must prove that he vacated because of Garfinkel's wrongful acts and that he vacated within a reasonable time after the wrongful acts occurred. I find that Rathborne failed in such proof" (xviA). Judgment was thereafter entered dismissing the action and counterclaim (iiiA, xixA).

Questions Presented

1. Did tenant prove Landlord's conduct seriously and substantially deprived the tenant of quiet enjoyment of his premises as to constitute a constructive eviction?

Judge Solomon found that tenant failed in such proof (xviA).

2. Even if Landlord's acts constituted a constructive eviction, did tenant vacate the premises within a reasonable time after the acts occurred?

Since the acts allegedly causing the constructive eviction were claimed to have commenced years prior to abandonment of the premises Judge Solomon found that tenant "in waiting as long as he did to vacate, cannot now argue that he was constructively evicted" (xviiiA-xixA).

Facts

On December 22, 1965, Rathborne entered into a lease with 873 for Apt. 5 of the Leased Premises (5A-6A, 173A). Thereafter, and on June 2, 1966, Rathborne entered into a second lease for Apt. No. 4 of the Leased Premises, including the privilege of using the roof extension located next to Apt. No. 4 (214A, 5A-6A, 173A). Each lease was for a period of two years. However, as the building was rent-controlled, Rathborne was permitted to, and did remain in the apartments after the leases expired at the same rent as a statutory tenant (xviA).

During the early part of the tenancy, Rathborne's relations with Garfinkel and 873 (hereinafter collectively referred to as "Landlord") were satisfactory (xviA, 22A-23A). Commencing in 1970, the relationship deteriorated (23A). At the same time that the relationship began deteriorating, Rathborne commenced receiving phychiatric help which he claimed was necessitated by his indictment and subsequent conviction for failure to file income tax returns (20A-21A). Significantly Rathborne had required prior psychiatric help and had received a medical discharge from the army because of "inability to adjust" (21A).

Dr. John Casarino, a "Board certified" psychiatrist (117A), testified that in October, 1972 Rathborne was "on the verge of a psychotic decompensation of a paranoid type." (124A) Dr. Casarino further testified:

> "Q. Dr. Casarino, the condition that Mr. Rathborne was in when you saw him in October, November of 1972, you have described in medical terms. Can you describe it in lay terms what you mean by that?
>
> A. Well, basically he was very freightened; so much so, I was impressed that he brought this dog to the apartment; and, I became a little afraid of him. He had difficulty sitting still. He would get up and walk around. He was very agitated. His sentences were fragmented. They were not flowing sentences. It was difficult at that time to get a full elucidated history. There were these—although there were no secondary symptoms such as hallucinations or delusions, I did feel there was referential radiation; that's when the events were happening outside you are taking to be reflected as being connected with you. The main thing was in the disorganization in the thinking.
>
> Q. Would you say he was on the verge of a nervous breakdown?
>
> A. Definitely." (125A)

In this mental state, Rathborne perceived the situation as Landlord conspiring with unknown individuals to create "chaos" and a "seige" of the apartments (20A, 126A). Rathborne claimed Landlord was responsible for placing feces and grease on his door and buzzer (15A, 36A), people going on the roof in the middle of the night and looking into his apartment (29A-30A, 52A), making threatening telephone calls (16A-17A), people knocking on

his door (17A), being attacked by a man with a long knife (37A), objects being thrown at him from roof tops (36A), a person pounding at his door with a long pole containing a metal hook damaging the door and lock (23A), filling the halls with trash, rubbish "and other objects and people and urine and paint or garbage" (26A), and someone tampering with his electric lines (23A). However, Rathborne did not have nor could he offer any proof that Landlord was in any way involved with these acts (15A-17A, 29A-30A, 36A-38A, 198A-200A). Rathborne testified:

> "Court: . . . Are any of these people who you assert attacked or harassed you in the employ or were they in the employ of Mr. Garfinkel?
>
> "The Witness: I don't have proof. . . ." (37A-38A)

Small wonder that in this setting the Trial Court concluded that Rathborne had "failed" to prove that "he vacated because of Garfinkle's wrongful acts" (xviA).

Rathborne's paranoia was apparently activated by a "change in the character of the neighborhood" (xviiA). Judge Solomon found that in 1968, the surrounding area "began to deteriorate greatly. There was an attempt by a developer to 'assemble' (completely purchase) the block in which Garfinkel's building was located. The developer bought other buildings and left them vacant. Drug rehabilitation centers moved into the block. Vandalism and street crimes increased; transients and addicts frequented the streets. Rathborne introduced no evidence to show that Garfinkel participated in the attempt to assemble the block or was responsible for the change in the character of the neighborhood. In my view, this change in the neighborhood and the dangers it posed to residents caused

Rathborne to move" (xviiA-xviiiA). Parenthetically we note that Dr. Casarino considered the undesirable character of the neighborhood "a contributing factor" in Rathborne's decision to move (127A-128A).

Rathborne contended that Landlord harassed him by threats and various legal proceedings. The evidence clearly proves that Landlord merely pursued rights accorded under Rent and Eviction Regulations of the City of New York or reacted to the unmerited provocation of Rathborne (xviA, 208A-209A, 285A). A typical example of Rathborne's actions occurred in February, 1972, in the chambers of New York Civil Court Judge Wahl. Rathborne had brought an action against Landlord to recover certain rent payments. During a settlement conference Rathborne referred to Garfinkel as a "mockey", an ethnic slur referring to members of the Jewish religion. In response Garfinkel called Rathborne a bigot and "berated him" (xviA, 14A, 59A, 179A, 209A). The Court found "that Rathborne was a constant source of irritation and continually provoked Garfinkel. Rathborne should have anticipated that Garfinkel would react to his remarks." (xviA-xviiA)

Rathborne's "attitude and his actions" led to various other disputes with his neighbors (xviiA). Munchtime, U.S.A., Inc. (hereinafter referred to as "Munchtime"), operated a restaurant on the ground floor of the Leased Premises pursuant to a lease that predated Rathborne's. During 1967 Munchtime installed an air-conditioner on the roof extension that Rathborne was also authorized to use for his garden (134A, 185A, 214A). The air-conditioning unit was installed without objection by Rathborne (147A). During the ensuing years Rathborne permitted Munchtime unhampered access to the unit (135A). The unit obviously did not interfere with Rathborne's

use of the roof extension for the development of his garden (153A-154A, 162A). However, in 1971 Rathborne suddenly denied Munchtime all access to the roof (5A-11A, 98A, 134A-137A, 202A). As a result of Rathborne's actions Munchtime was without air-conditioning for practically the entire summer of 1972 causing substantial food spoilage and loss of business (136A-138A, 150A). Mr. Avolon, the owner of Munchtime, testified that when he spoke to Rathborne about gaining access to the air-conditioner Rathborne stated "I don't want your business here. I don't like your business" and that the type of clientele who frequented Munchtime "downgrades the neighborhood" (137A, 140A, 282A). Munchtime reacted by refusing Rathborne access to the fuse boxes controlling the electricity of his apartments which were located in a basement leased to Munchtime for storage of its inventory (139A-140A, 201A-202A). Rathborne's air-conditioners apparently were excessive for the electrical service to his apartments and thus as the Trial Court found they "were continually blowing his own fuses" (xviiA). Because of his feud with Munchtime he was without electricity at times in June and July 1972 (53A-54A, 201A-202A). There was no evidence that the electrical problems were caused in any way by Garfinkel. In fact the evidence established that the problem was occasioned solely because of Rathborne's overloaded electrical service and his dispute with Munchtime (xviiA, 280A). The Court found that "Garfinkel was unsuccessful in his attempt to resolve the dispute because Rathborne was intransigent. Garfinkel was angry and complained that Rathborne would do nothing to settle the dispute" (xviiA, 201A-202A) concluding that "I find that Rathborne failed to prove intentional misconduct by Garfinkel." (xviiA)

Rathborne includes in his characterization of harassment the action brought by Landlord pursuant to sec-

tion 18 of the Rent and Eviction Regulations of the City of New York to decontrol the apartment used by Rathborne as an office (viiiA, 266A). Rathborne had operated at the subject premises an organization that he created and financed out of a trust created for his benefit known as "Mind" which was engaged in research into extrasensory perception (18A-19A).

Section 18a of the Rent and Eviction Regulations provides:

> "Upon application of the landlord, the Administrator shall issue an order decontrolling a housing accommodation where he finds that the tenant in possession maintains his primary residence at some place other than at such housing accommodation." (183A)

In the proceedings before the Housing and Development Administration both Landlord and Rathborne were represented by counsel (102A, 181A-184A, 232A-238A). The proceedings were concluded in favor of Landlord by an order issued on September 7, 1972 decontrolling the apartment (238A). Rathborne thereupon appealed the order by issuing a protest. However, Rathborne did not pursue the appeal and it was dismissed in December, 1972 (239A-243A). Obviously this adversary proceeding determined adverse to Rathborne cannot be considered an act of harassment by Landlord. Parenthetically we note that although Rathborne sought to attack the decontrol order in this action, under New York law the only means available to challenge that ruling is a C.P.L.R. Article 78 proceeding (183A-184A). (See *Ballou* v. *Reid,* 106 N.Y.S. 2d 939 [n.o.r.]). The numerous other legal actions commenced by Rathborne and Landlord during the course of the tenancy were all resolved prior to this action (100A-102A, 175A-179A).

In any event, despite the absence of any proof that Landlord interfered with Rathborne's enjoyment of the Leased Premises, the Trial Court further held that:

> "[E]ven if Garfinkel's acts constituted a constructive eviction, which I find they did not, Rathborne cannot complain of those acts because he did not vacate the premises within a reasonable time after the acts occurred. . . . Rathborne vacated in November 1972. The Munchtime air-conditioner was installed in 1966. The hostility between Garfinkel and Rathborne began about 1970. The electricity was restored in July, 1972. The buzzer never worked, and the lock was broken since June, 1972. Even assuming fault on the part of Garfinkel, Rathborne, in waiting as long as he did to vacate, cannot now argue that he was constructively evicted." (xviiiA-xixA).

POINTS

I. Appellant failed to prove any acts by respondents which constituted a constructive eviction.

As federal jurisdiction in this action is based upon diversity of citizenship, New York substantive law is controlling. *Erie R. Co.* v. *Thompkins,* 304 U.S. 64.

The law is settled that "constructive eviction exists where, although there has been no physical expulsion or exclusion of the tenant, *the landlord's wrongful acts substantially and materially deprive tenant of the beneficial use and enjoyment of the premises (City of New York* v. *Pike Realty Corp.,* 247 N.Y. 245; Ann.-Nonhabitability of Leased Dwellings, 4 A.L.R. 1453, 1461-1463, supp. 29 A.L.R. 52, supp. 34 A.L.R. 711, 1 Rasch, [Landlord and

Tenant] §§ 871-875)." *Barash* v. *Pennsylvania Terminal Real Estate Corporation,* 26 N.Y.2d 77, 83. (Emphasis supplied)

The key element of a constructive eviction is that the wrongful acts must be committed by or under the authority of the Landlord and be of such a nature as to have a substantial or material effect on the tenancy. *Barash* v. *Pennsylvania Terminal Real Estate Corporation, supra; Finkelstein* v. *Levinson,* 74 Misc. 2d 105; *East Haven Associates, Inc.* v. *Gurian,* 64 Misc. 2d 276; *City of New York* v. *Deland,* 63 Misc. 2d 494. "What constitutes a constructive eviction is generally a question of fact. 'It must appear that the landlord has persistently neglected his duty, and that the premises became unfit for occupancy. A series of petty inconveniences . . . are not sufficiently serious to warrant a claim of constructive eviction.' (1 Rasch § 886)." *Malek* v. *Perdina,* 58 Misc. 2d 960, 962; See also *Hayden Company* v. *Kehoe,* 177 A.D. 734; *Read* v. *Levy,* 101 Misc. 547.

In the instant case Rathborne has alleged that the Landlord has engaged in a course of harassment that amounted to a constructive eviction. However, when giving the details of the alleged harassment, he testified:

> "Court: . . . Are any of these people who you assert attacked or harassed you in the employ or were they in the employ of Mr. Garfinkel?
> The Witness: I don't have proof. . . ." (37A-38A)

The Trial Court, after making specific findings as to each alleged act of harassment held that "[t]o prove constructive eviction, Rathborne must prove that he vacated because of Garfinkel's wrongful acts and that he vacated within a reasonable time after wrongful acts occurred. I find that Rathborne failed in such proof." (xviA) As

was held in *Read* v. *Levy, supra,* the question as to whether a constructive eviction had been established was "a question of fact" and the trier of the facts "having resolved it in favor of the defendants, the verdict should not have been disturbed." (p. 550).

Furthermore, the Landlord was not obligated to insure against the fears that Rathborne, in his paranoid state, imagined were threatening his enjoyment of the Leased Premises. "Inadequate protection has never been construed to constitute a constructive eviction or a breach of the covenant of quiet enjoyment." *New York City Housing Authority* v. *Medlin,* 57 Misc. 2d 145, 150.

The Trial Court held that the character of the neighborhood of the Leased Premises deteriorated greatly. This was hastened when a developer, not appellees, sought to "assemble" the entire block. "Rathborne introduced no evidence to show that Garfinkel participated in the attempt to assemble the block or was responsible for the change in the character of the neighborhood." (xviiA-xviiiA)

When questioned in this regard by the Trial Court, Dr. Casarino, Rathborne's psychiatrist testified:

> "Q. (By the Court) Did you say that the change in the neighborhood and establishment of an Odyssey House in close proximity to this building which treated its residents with methadone, would that have any effect upon him? A. Only insofar as he perceived it as a threat to him. I don't recall his going into that in anything. And, if it were perceived as a threat, I think it would be one of many he was dealing with.
>
> Q. And now the evidence here is somewhat conflicting. For example, various witnesses have tes-

tified that there was garbage thrown in the common doorway, and another witness testified that she occupied that same entrance and her testimony was she didn't like the dirt, but she did not attribute the lack of cleanliness to a desire of the owners to get her out, but he did. A. Yes.

Q. Is that consistent with what you saw and your examination? A. Yes, consistent insofar as he perceived those things.

Q. As a direct threat to him? A. Yes, sir.

Q. And a direct attempt on the part of the owner to get rid or him, regardless whether they were so directed? A. I think so, yes." (130A-131A)

The questioning by Judge Solomon continued:

"Q. And if other people suffered from the lack of electricity and energy or the turning off of the lights, would his feeling that this was directed towards him and not directed towards anyone else be consistent with what you found to be the case? A. Well, I believe so. That's what he said.

Q. So, it doesn't make any difference whether the owners were really trying to evict him or trying to harass him, he interpreted some of the things that he saw as being an action on the part of the owners to evict him? A. Yes." (131A-132A)

In light of Dr. Casarino's response to the Court's questions it was apparent that Rathborne's "disorganization in thinking" (125A) had caused him to attribute every untoward event to Garfinkel. Although in Rathborne's mind he conceived of himself as being harassed the fact is, as the Trial Court correctly found, Appellees were not involved and the complaint was properly dismissed.

II. To invoke the doctrine of constructive eviction the tenant must abandon the premises within a reasonable time after the conditions justifying the abandonment have developed.

In order for a tenant to claim a constructive eviction by the Landlord, he must abandon the premises within a reasonable time after the conditions justifying the abandonment develop. "The law is clear that the abandonment must occur with reasonable promptness after the conditions justifying it have developed." *East Haven Associates, Inc.* v. *Gurian, supra,* 278. See also, *Barash* v. *Pennsylvania Terminal Real Estate Corporation, supra,* 83; *Pasqua* v. *De Marchi,* 31 A.D.2d 781; 1 Rasch, *supra* §926. The issue as to what constitutes a reasonable time is a question for the trier of facts to decide. *Hayden Company* v. *Kehoe, supra, Read* v. *Levy, supra; New York State Investing Company* v. *Wolf,* 84 Misc. 66. However, the cases have held that a delay of two months is unreasonable. *Waldene Realty Co., Inc.* v. *Pfalzer,* 223 A.D. 787; *Ernest* v. *Wheatley,* 93 N.Y.S. 1116 [n.o.r.]. The Trial Court found that "[e]ven if *Garfinkel's acts constituted a constructive eviction, which I find they did not, Rathborne cannot complain of those acts because he did not vacate the premises within a reasonable time after the acts occurred.*" (xviiiA; emphasis supplied)

A tenant is barred from relying upon wrongful acts constituting a constructive eviction if they have ceased prior to his vacating the premises (*Goldberg* v. *Lloyd,* 110 N.Y.S. 530 [n.o.r.]; Rasch, Landlord and Tenant, § 929).

The Trial Court found:

> "Rathborne vacated in November, 1972. The Munchtime air conditioner was installed in 1966.

> The hostility between Garfinkel and Rathborne began about 1970. The electricity was restored in July, 1972. The buzzer never worked, and the lock was broken since June, 1972. Even assuming fault on the part of Garfinkel, Rathborne, in waiting as long as he did to vacate, cannot now argue that he was constructively evicted." (xviiiA-xixA)

III. The evidence at trial clearly supports the findings of fact and conclusions of law made by Judge Solomon after trial.

The Federal Rules of Civil Procedure, Rule 52(a) provides in part:

> "Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the witnesses."

Rathborne failed to produce a single witness to prove that appellees were in any way responsible for the alleged acts of harassment which Rathborne claimed constituted the constructive eviction. On the contrary, the witnesses on trial testified that Rathborne's paranoid state and the character of the neighborhood were responsible for Rathborne's decision to abandon the Leased Premises. The Court observed these witnesses and this Appellate Court "must give 'due regard . . . to the opportunity of the trial court to judge the credibility of the witnesses.' Rule 52(a), Fed.R.Civ.P. It is his duty to appraise the testimony and demeanor of the witnesses. *United States* v. *Oregon State Medical Society,* 343 U.S. 326, 72 S.Ct. 690, 96 L.Ed. 978 (1952); *Omega Importing Corp.* v. *Petri-Kine Camera Company, Inc.,* 451 F.2d

1190, 1197 (2d Cir. 1971); *Anderson* v. *Federal Cartridge Corp.*, 156 F.2d 681 (8th Cir. 1946)." *United States* v. *Diapulse Corporation of America*, 457 F.2d 25, 30 (2d Cir. 1972); *Grove* v. *First National Bank of Herminie*, 489 F.2d 512, 515 (3rd Cir. 1973). Unless the plaintiff meets his burden of persuading the trier of fact by a preponderance of the evidence, the judge must, as was done in this case, dismiss the complaint. *Lassiter* v. *Fleming*, 473 F.2d 1374 (2d Cir. 1973).

In Lassiter v. *Fleming, supra*, this Court reiterated the appropriate standard of review of the proceedings below holding:

> "On appeal, plaintiff challenges certain critical factual inferences drawn by the judge, which, he argues, were altogether unwarranted by the evidence. Where factual findings are challenged, however, we may not set them aside 'unless clearly erroneous.' Fed.R.Civ.P. 52(a)." (p. 1375). See also, *Jackson* v. *Statler Foundation*, 496 F.2d 623, 626 (2d Cir. 1974).

This Court further held in the case of *Grove* v. *First National Bank of Herminie, supra*:

> "'It is the responsibility of an appellate court to accept the ultimate factual determination of the fact-finder unless that determination either (1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supportive evidentiary data.' *Krasnov* v. *Dinan*, 465 F.2d 1298, 1302 (3d Cir. 1972)" (p. 515).

In light of Rathborne's failure to prove that he abandoned the Leased Premises because of acts committed by Landlord, Judge Solomon's findings were clearly supported and it is respectfully asserted should not be disturbed.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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9/3/25- Received 2 copies of this brief.

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